

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK

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ERNESTO CAPPONE,

Plaintiff,

- against -

WILLIAM MORRISSEY; KEVIN KIM; LIBERTY  
MERCHANT GROUP; AND MERCHANT  
SOLUTIONS GROUP,

Defendants.

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ROSLYNN R. MAUSKOPF, United States District Judge.

**ORDER ADOPTING REPORT  
AND RECOMMENDATION**  
16-CV-7170 (RRM) (SJB)

Plaintiff Ernesto Cappone brought this action against defendants William Morrissey, Michael Gallo, Kevin Kim, Liberty Merchant Group, Merchant Solutions Group, and World Business Lenders, LLC on December 29, 2016, alleging violations of the Racketeer Influenced and Corrupt Organizations Act (“RICO”), 18 U.S.C. § 1961 *et seq.*, and various state laws. (Compl. (Doc. No. 1).) On July 14, 2017, the Clerk of Court issued a certificate of default against defendants Morrissey, Liberty Merchant Group, and Merchant Solutions Group; and Cappone subsequently moved for default judgment against those defendants.<sup>1</sup> (Certificate of Default (Doc. No. 33).) This Court referred the motion to the Honorable Magistrate Judge Sanket J. Bulsara.

On July 27, 2018, Judge Bulsara issued a Report and Recommendation (“R&R”) recommending that the Court deny default judgment and dismiss without prejudice Cappone’s RICO causes of action for failure to state a claim, and further, that the Court decline supplemental jurisdiction over Cappone’s state law claims. (R&R (Doc. No. 47) at 22–23.)

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<sup>1</sup> As the Report and Recommendation notes, Cappone voluntarily dismissed his claims against defendants Gallo and World Business Lenders, LLC. (R&R (Doc. No. 47) at 1 n.1.)

Judge Bulsara reminded the parties that, pursuant to Federal Rule of Civil Procedure (“Rule”) 72(b), any objection to the R&R must be filed within fourteen days. (R&R at 24.) No party has filed objections, and the time to do so has now expired.

Pursuant to 28 U.S.C. § 636(b) and Rule 72(b), the Court has reviewed the R&R for clear error and, finding none, concurs with the R&R in its entirety. *See Covey v. Simonton*, 481 F. Supp. 2d 224, 226 (E.D.N.Y. 2007).

Accordingly, as to defendants Morrissey, Liberty Merchant Group, and Merchant Solutions Group, 1) the Clerk’s entry of default is hereby vacated, 2) Cappone’s motion for default judgment is denied, 3) all RICO claims are dismissed without prejudice, and 4) the Court declines to exercise supplemental jurisdiction over all remaining state law claims.

There are two remaining issues to address. First, Magistrate Bulsara directed Cappone, to file, by August 10, 2018, a stipulation of dismissal against the remaining defendant, Kevin Kim, who has appeared in this action *pro se*, or otherwise show cause as to why Cappone’s claims against Kim should not be dismissed under Rule 41 as Cappone has not pursued his claims against Kim in any way since Kim filed his answer on June 28, 2017. (R&R at 1, n.1.) Cappone failed to comply with this Order. Out of an abundance of caution, the Court hereby orders Cappone to file, by August 31, 2018, a stipulation of dismissal against defendant Kim, or otherwise show cause as to why all claims against Kim should not be dismissed for failure to prosecute, or for failure to state a claim for the reasons set forth in Judge Bulsara’s R&R. Cappone’s failure to comply with this Order will result in dismissal of all remaining claims for failure to prosecute.

Finally, during the litigation on Cappone’s motion for default judgment, Magistrate Judge Bulsara ordered Cappone to provide supplemental evidence, and Cappone failed to so do. As a

result, Judge Balsara ordered Cappone to show cause, by August 10, 2018, why sanctions should not issue pursuant to Rules 37 and 41. (R&R at 23-24.) Once again, Cappone failed to comply with Judge Balsara's order. This Court will leave to Judge Balsara the imposition of any sanctions for the violation of Judge Balsara's order; however, Cappone's repeated failures to comply with court orders throughout this litigation will be taken into account should this Court reach the issue of dismissing the remaining claims for failure to prosecute as noted above.

The Clerk of Court is directed to mail a copy of this Order together with Judge Balsara's Report and Recommendation to defendant Kevin Kim, and note the mailing on the docket.

SO ORDERED.

Dated: Brooklyn, New York  
August 24, 2018

*Roslynn R. Mauskopf*

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ROSLYNN R. MAUSKOPF  
United States District Judge